IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. ———.

SWISS NATIONAL INSURANCE COMPANY, LTD., a Corporation of Basle, Switzerland, *Petitioner,*

against

LEO T. CROWLIY, as Alien Property Custodian, and W. A. JULIAN, as Treasurer of the United States, *Respondents..*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia is not yet reported in App. D. C., nor in F. (2d), and is found at pages 185-188 of the Record.

JURISDICTION.

Section 240(a) of the Judicial Code, 28 U. S. C. § 347(a), gives this Court jurisdiction to review by certiorari the judgment of the Court below.

STATEMENT OF THE CASE.

The case was presented to the District Court on a stipulation setting forth the material facts (R. 53-58).

Petitioner, a Swiss corporation, in 1910 established an office in the City of New York. Upon the outbreak of war in April 1917, President Wilson issued a proclamation (R. 25-26) authorizing German insurance companies to continue operation under specified conditions. Whether petitioner mistakenly availed itself of this permission, as the Court below suggests (R. 185), or whether it continued to operate on the theory that it was not an enemy, is not clear from the Record. In any event, by virtue of Section 2(a) of the Trading with the Enemy Act, enacted October 6, 1917, petitioner became an enemy alien, and on November 27, 1917, the Secretary of the Treasury issued petitioner a revocable license to continue its insurance business (R. 59-60). This was superseded by a license dated October 6, 1918 (R. 60-63). Petitioner continued to operate its United States branch until November 18, 1918, when the last license issued to it was revoked (R. 63-64). Shortly thereafter all property of petitioner located in the United States was seized by the Alien Property Custodian.

On March 3, 1924, petitioner filed with the Alien Property Custodian, pursuant to Section 9(a) of the Trading with the Enemy Act, a claim for the return to it of an amount equal to the profits earned by it from April 6, 1917, to November 18, 1918. On June 15, 1925, President Coolidge (R. 66), upon the opinion of Attorney General Sargent (R. 67-72), allowed the claim and directed that the amount of such profits be ascertained and paid to petitioner (R. 56).

The opinion of the Attorney General took the position that petitioner operated under Governmental license from April 6, 1917, to November 18, 1918, and that as a consequence petitioner was not an enemy during the license period and was entitled, by reason of Section 9(a) of the Trading with the Enemy Act, to the return of profits earned

during that period. This opinion is in accord with the conclusions reached in a number of similar cases presented to three Attorneys General and three Presidents (R. 56-57).

Thereafter an audit was made to determine the amount of such profits with interest and income earned thereon, and the sum of $419,230.97 was received by petitioner from the Custodian.

After enactment of the Settlement of War Claims Act of 1928, 45 Stat. 254, petitioner received from the Custodian an amount supposed to be 80 per cent of the residue of its seized property. Believing that this latter amount had not been properly computed, petitioner commenced the present action against the Custodian and the Treasurer of the United States for an accounting. The defendants, now replaced by their successors in office, answered and counterclaimed for the recovery of 20 per cent of the amount returned to petitioner as profits pursuant to the Presidential order of 1925, contending that the order was improper (R. 12-25). The claim set forth in the bill of complaint (R. 2-7) was settled, and the trial court awarded judgment (R. 151) to respondents on their counterclaim, with an opinion (R. 148-150) stating that the return to petitioner of the profits was unlawful and was subject to judicial correction.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred:

(1) In holding that the action of President Coolidge in allowing petitioner's claim to the return of profits earned between April 6, 1917, and November 18, 1918, was reviewable in the present suit;

(2) In determining that it is not inequitable to require petitioner to pay back the amount returned to it by virtue of the President's order of June 15, 1925, and that respondents' counterclaim, demanding such repayment, is maintainable.

BRIEF OF THE ARGUMENT.

POINT I. Even if the President's allowance of petitioner's claim to the return of the profits was erroneous, his decision was final and not subject to judicial review. This contention rests upon the provisions of the Trading with the Enemy Act, read in the light of the general principles applicable to judicial review of executive and administrative action.

POINT II. The basis of recovery of moneys claimed to be improperly or unlawfully paid is unjust enrichment; and although the return to petitioner of the profits may have been made without authority of law, petitioner is fairly entitled to retain the funds in equity and good conscience, inasmuch as beneficial ownership has at all times received in petitioner.

POINT I.

Even if the President's allowance of petitioner's claim to the return of the profits was erroneous, his decision was final and not subject to judicial review. This contention rests upon the provisions of the Trading with the Enemy Act, read in the light of the general principles applicable to judicial review of executive and administrative action.

Petitioner's claim for the return of the profits earned by it during the license period was presented and allowed pursuant to Section 9(a) of the Trading with the Enemy Act (50 U. S. C. A., appendix) which provides that "Any person not an enemy or ally of enemy" claiming an interest in property held by the Custodian may apply to the President, who "may order the payment * * * to said claimant of the money or other property so held by the Alien Property Custodian * * *"

Since the right to make a claim is expressly limited to one not an "enemy or ally of enemy" and the President may order payment only to such a claimant, it is plain that

the President may not allow a claim without making a determination as to the non-enemy status of the claimant. In the present case the President must have determined that petitioner's status was that of a non-enemy in so far as the profits were concerned. Such a determination, we contend, involved the exercise of quasi-judicial powers and is not subject to judicial review.

That an executive or administrative determination of this nature may not be scrutinized by the courts is an established principle of administrative law, applied in many decisions of this Court. For example, in *Butte, A. & P. Ry.* v. *United States*, 290 U. S. 127, this Court held that an award by the Interstate Commerce Commission to a carrier was final and not subject to reconsideration by the courts. The decision in *Great Northern Ry.* v. *United States*, 277 U. S. 172, is similar. A number of recent decisions of this Court indicate a strong reluctance to permit judicial interference with executive or administrative action.

> *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113;
> *United States* v. *Bush & Co.*, 310 U. S. 371;
> *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470;
> *United States* v. *Morgan*, 313 U. S. 409;
> *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

None of these decisions is entirely in point. The question in each case is essentially one of statutory construction: the inquiry is whether Congress intended to authorize judicial review of the particular executive or administrative determination.

There can be no doubt that Congress had power to ascribe complete finality to a Presidential allowance under Section 9(a). *United States* v. *Babcock*, 250 U. S. 328. We believe that the intent of Congress to do so is clearly apparent from a consideration of the language of the Act. Under subsection (a) of Section 9, a claimant may apply to the President for relief, and, if the President does not act fav-

orably within 60 days, may institute a suit in equity in the appropriate court; or the claimant may in the first instance proceed by suit in equity. Thus, while there is an express provision for judicial reconsideration of a Presidential refusal to order repayment, there is no such provision for review of a Presidential allowance. A clearer inference of Congressional intention would be difficult to discover.

Other provisions lend support to this view. Section 9(c) provides, in part:

> "The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof."

The following language, contained in Section 12, also indicates that court order and Presidential allowance were to be of equal force and effect:

> "*Provided, however,* that on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court."

It is thus perfectly apparent that Congress intended a Presidential order under Section 9 to be no less authoritative or conclusive than a judicial decree; they were to be "alternative methods of decision of equal weight and finality". (*United States* v. *Rodiek*, 117 F. (2d) 588, 591; affirmed by an equally divided court, 315 U. S. 783.) This Court has recently held that a judicial decree in favor of a non-enemy claimant who elected to proceed by suit under

Section 9, instead of by application to the President, could not be set aside years later on the ground that the claimant was in fact an enemy at the time his claim was judicially allowed. *Jackson* v. *Irving Trust Co.*, 311 U. S. 494. We believe that under the statutory provisions above referred to a Presidential allowance under Section 9 is no more subject to collateral attack than a judicial decision.

The argument we make here has been before the courts on several occasions. See *Cummings* v. *Societe Suisse*, 66 App. D. C. 121, 85 F. (2d) 287; *Societe Suisse* v. *Cummings*, 69 App. D. C. 154, 99 F. (2d), 387; cert. denied, 306 U. S. 631; *Isenberg* v. *Biddle*, 75 App. D. C. 100, 125 F. (2d) 741; *United States* v. *Rodiek*, 177 F. (2d) 588, affirmed by an equally divided court, 315 U. S. 783. In each instance, the court refused to consider the contention on its merits, holding that the plaintiff had himself, by bringing suit, attacked the allowance previously made and had thus invited the court to re-examine all the questions involved in the original claim. It was on that basis that the Court of Appeals for the District of Columbia, in *Isenberg* v. *Biddle, supra*, distinguished *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, referred to above.

In the present case petitioner has in no way attacked the order of the President under Section 9 directing the return to it of profits earned during the license period, nor has it questioned the amount received by it pursuant thereto. The complaint herein sought rather a recomputation of the amount awarded petitioner under the Settlement of War Claims Act of 1928, an entirely different matter unrelated to the question determined by the President under Section 9 of the Trading with the Enemy Act. Thus it cannot be said that petitioner has opened the door to reconsideration of the President's order, and this case squarely presents the question whether a Presidential allowance under Section 9 is subject to review by the courts.

POINT II.

The basis of recovery of moneys claimed to be improperly or unlawfully paid is unjust enrichment; and although the return to petitioner of the profits may have been made without authority of law, petitioner is fairly entitled to retain the funds in equity and good conscience, inasmuch as beneficial ownership has at all times remained in petitioner.

The respondents' counterclaim rests not upon any statutory basis but upon the equitable principles of restitution. It cannot be doubted that money paid by mistake can be recovered only if the person from whom recovery is sought has been unjustly enriched.

The considerations underlying the cause of action for restitution were explored and analyzed by Mr. Justice Cardozo in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301. In that case, after an order of the Interstate Commerce Commission authorizing an increase in rates had been declared invalid by this Court, certain shippers sought restitution from the railroad of the difference between the old rates and the higher rates collected pursuant to the invalid administrative order. This Court held that, in equity and conscience, the railroad was entitled to retain the full amounts collected.

Therefore, the question here is whether petitioner would be unjustly enriched by the retention of the amount received by it under the President's order of June 15, 1925. We believe that a brief consideration of the underlying facts and circumstances leads to the conclusion that petitioner should not be required to return the funds in question.

It is important to note that this is not a case where ordinary public funds of the United States, such as taxes collected by it, have been improperly paid out of the Treasury. In such cases the United States is ordinarily entitled to restitution. *Wisconsin Central R. R.* v. *United States*, 164 U. S. 190

Here the funds in question originally belonged to petitioner. International law and usage, to which the United States has always sedulously adhered and which are "part of our law" (The Paquete Havana, 175 U. S. 677, 700), have long proscribed the confiscation of private enemy property.

United States v. *Percheman*, 7 Peters 51, 87;
United States v. *Klein*, 13 Wallace 128, 137;
Moore, Digest of International Law, Volume 7, pp. 312-313.

In the instant case the Court below, on the authority of *Cummings* v. *Deutsche Bank*, 300 U. S. 115, held that a seizure of enemy property under the provisions of the Trading With the Enemy Act divested the enemy of every interest therein and that such property "when taken by the Custodian became the property of the United States absolutely." (R. 188.) In other words, a seizure of property under the Trading With the Enemy Act, as interpreted by the Supreme Court in that case, amounted to confiscation.

This Court has in the past, in many instances, expressed its readiness to reconsider and reverse former rulings where it developed that such rulings were clearly erroneous. We respectfully urge that the decision of the Court in *Cummings* v. *Deutsche Bank, supra,* should be reexamined by this Court in the light of certain enactments by Congress which were not brought to the attention of the Court in the briefs filed in that case nor considered by the Court in its opinion.

The Trading With the Enemy Act became law on October 6th, 1917, six months after we entered the First World War. On July 1st, 1918, Congress directed as follows:

> "All taxes heretofore or hereafter lawfully assessed by any body politic against money or other property held by the Alien Property Custodian, shall be paid out of such money or other property, and if that be insufficient shall be charged thereto and paid out of any other moneys or properties required from the same enemy or ally of enemy." (40 Stat. 646.)

Section 24 (a) of the Trading With the Enemy Act, added by the Act of March 4, 1923, 42 Stat. 1516, provides:

> "The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depository for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act."

Obviously confiscation of enemy property would vest full title, equitable and legal, in the United States. But the above statutes are entirely inconsistent with the theory that Congress intended to confiscate enemy property, for under our law property of the United States is not taxed by the Federal Government, nor is it ordinarily subject to taxation by State or local authorities.

Neither the Executive nor Congress has ever manifested any intention to depart from the principle that private enemy property is not subject to confiscation, and these statutes relating to taxes, together with much other evidence, show clearly that enemy property was not confiscated but was merely placed in the custody of the Alien Property Custodian, its final distribution to be determined by the Congress.

The statement of the Secretary of State of February 8th, 1917, made under the President's authority almost two months prior to the entry of the United States into the First World War, described as "entirely unfounded" all fears by foreign subjects that in the event of the war their

property would be seized. Every Act of Congress bearing upon the subject voices the rejection of any policy of confiscation. The very title of the Settlement of War Claims Act of 1928, 45 Stat. 254, speaks of the "ultimate return of all property held by the Alien Property Custodian." Many of the provisions of that Act recognize, in unmistakable terms, the continuing interest of the former enemies in the 20 per cent of the property which was retained by the Government for certain specified purposes. For example, in Section 10 (Section 25 of the Trading With the Enemy Act), the Secretary of the Treasury is directed to issue to the Custodian certain interest-bearing certificates as evidence of the investment by the latter of funds in his possession, and Section 25 (e) (2) refers to the former enemies as "owners of the money invested." The Act also provided that no property should be returned unless the "person entitled thereto" should file his consent to "postponement" of the return of the 20 per cent (Section 14, constituting Section 9 (m) of the Trading With the Enemy Act). And the return of the 20 per cent is referred to as "temporarily postponed" (Section 25 (a) (2) of the Trading With the Enemy Act).

Similarly, the drastic Public Resolution No. 53 of June 27, 1934, 48 Stat. 1267, provides, not for confiscation, but for a postponement of return.

In the light of these enactments by the Congress of the United States, we submit that it is clear that property seized under the Trading With the Enemy Act was not confiscated but remained the property of the enemy owner. On no other theory can the action of Congress directing the Alien Property Custodian to pay Federal, State and Municipal taxes be explained. And on no other theory than that of continued beneficial ownership in the enemy can we explain the express direction of Congress to the Alien Property Custodian to pay the taxes out of other property taken over from the same enemy whenever the property against which the tax was assessed was insufficient.

How, then, can it be said that petitioner was unjustly enriched by the return to it of money to which it was entitled, which return was at most a premature performance by the United States of an obligation imposed by International law and repeatedly recognized by Congress? The court below summarily dismisses the contention by stating that petitioner "obtained moneys of the United States to which it was not entitled under existing law." (R. 187.) But this entirely fails to meet the issue; the fact that "existing law" may not have justified the return does not prove that petitioner was unjustly enriched. The courts have often refused to compel the return of public funds improperly paid out where they have felt that the payee was fairly entitled to retain what he had received.

> *Badeau* v. *United States*, 130 U. S. 439;
> *United States* v. *Royer*, 268 U. S. 394.

Thus it is no answer at all to say merely that Congress had not yet provided for return of the funds in question.

> "The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it."
>
> (*Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 310.)

We submit that petitioner was fairly entitled to keep the moneys returned to it under President Coolidge's order and that the counterclaim should therefore have been dismissed.

CONCLUSION.

Under the principles contended for by respondents and adopted by the courts below, funds paid over to a claimant pursuant to Presidential allowance under Section 9 of the Trading with the Enemy Act, are at any time subject to being reclaimed by the Government, whether, as here, many years after payment, or, if the Government desires, immedi-

ately following the President's order. That Congress intended no such result seems apparent from the language of the statute. It is equally plain that it is inequitable to require this petitioner to return funds which it received many years ago in complete good faith and to which it was deemed entitled by the Attorney General, the Alien Property Custodian and the President, whose decision was reached after full consideration by those Government officials whom he had chosen to deal with such questions.

The questions presented by the petition are important and are likely to arise frequently in the administration of the Trading with the Enemy Act during and after the present war. We submit that the decision of the court below is erroneous and that this is a case which calls for the exercise by this Court of its supervisory powers.

Respectfully submitted,

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